

**** E-filed April 28, 2011 ****

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

RICHARD R. LANE,

No. C10-05779 HRL

Plaintiff,

**ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS**

v.

ANNE STAUSBOLL, et al.,

[Re: Docket No. 7]

Defendants.

INTRODUCTION

Plaintiff Richard Lane ("Lane"), a former lecturer at San Jose State University ("SJSU") filed this action against Anne Stausboll ("Stausboll"), the current CEO of the California Public Employees' Retirement System ("CalPERS"), and Rob Feckner ("Feckner"), the current President of the CalPERS Board of Administration (collectively, "Defendants"). He is suing them under 28 U.S.C. § 1983 for violation of his United States Constitutional rights; and for negligence, negligent supervision, intentional infliction of emotional distress, and negligent infliction of emotional distress under California law. Docket No. 1 ("Complaint").

Defendants moved to dismiss Lane's complaint on numerous grounds. Docket No. 7 ("MTD"). First, they argue that Lane's § 1983 claims are barred by res judicata and by the statute of limitations; that Defendants are protected by official immunity; that § 1983 does not provide a remedy for an alleged misapplication of state law; and that there is no basis for holding Defendants personally liable under § 1983. Id. Second, they argue that federal-subject matter jurisdiction over

Lane's state law claims does not exist because Lane failed to first file these claims with the California Victim's Compensation and Government Claims Board. *Id.* They also argue that Lane's intentional infliction of emotional distress claim fails because he does not allege that Defendants' conduct was "outrageous." *Id.*

Lane opposed the motion. Docket No. 10 ("Opp'n"). Oral argument was heard on March 8, 2011. For the reasons set forth below, the Court GRANTS Defendant's motion.¹

BACKGROUND

This case involves a long-standing dispute between Lane and CalPERS concerning the amount of his pension. The California Court of Appeal, Sixth Appellate District, previously described some of the relevant background:

The CalPERS retirement fund is established as a trust, administered in accordance with the provisions of the Public Employees' Retirement Law ([Cal. Gov't Code] § 20000 et seq., hereafter "PERL"), solely for the benefit of the participants. ([Cal. Gov't Code] § 20170.) The retirement system is funded by contributions from employers and employees, calculated as a percentage of an employee's compensation. (*Hudson v. Board of Administration* (1997) 59 Cal.App.4th 1310, 1316.) A member's retirement benefits are based on their years of service within the system, final compensation and age at retirement. (*Ibid.*)

From 1986 to 2002, Lane worked as a lecturer at San Jose State University (SJSU) on a temporary basis. Lane retired from that employment on May 30, 2002, and elected to have his final compensation calculated on the basis of what he earned over the prior 12-month period, i.e., May 31, 2001 to May 30, 2002. Lane's final compensation for that period was ultimately determined to be \$70,707.60. [Footnote omitted.]

Over the 12-month period before his retirement, Lane taught classes in three departments under three separate part-time contracts. These contracts were effective from August 23, 2001 to May 29, 2002 and comprised the fall 2001 and spring 2002 semesters at SJSU. Official dates of instruction for the fall 2001 semester consisted of August 23, 2001 to December 11, 2001 and for the spring 2002 semester, January 23, 2002 to May 14, 2002, with a one week examination and grading period at the end of each semester.

Consequently, Lane actually worked as an instructor for seven and a half months of the 12 months immediately preceding his retirement. However, Lane's salary was paid to him in 12 monthly installments. During the four and a half months when Lane was not teaching, he was able to draw unemployment benefits. [Footnote omitted.]

On May 18, 2005, Lane wrote to CalPERS requesting that his retirement benefit be calculated by dividing the amount he earned over the 12-month period leading up to his retirement by the number of months he actually worked, i.e., seven and a half

¹ Pursuant to 28 U.S.C. § 636(c) and FED. R. CIV. P. 73, all parties have expressly consented that all proceedings in this matter may be heard and finally adjudicated by the undersigned.

1 months, rather than 12 months. CalPERS rejected Lane's request and, citing [Cal.
2 Gov't Code] section 20035(a), stated that it would calculate his average final
3 compensation by dividing Lane's final compensation of \$70,707.60 by 12.
Accordingly, on August 8, 2005, CalPERS notified Lane that his average monthly
payrate for the 12-month period before his retirement was \$5,892.30.

4 Lane appealed CalPERS' decision to the CalPERS board of administration, and his
5 appeal was heard by an administrative law judge (ALJ). The ALJ denied Lane's
6 appeal in a proposed decision, which was adopted by the CalPERS board of
administration. The CalPERS board of administration denied Lane's subsequent
request for reconsideration.

7 Lane filed a petition for writ of mandate and administrative mandate pursuant to Code
8 of Civil Procedure sections 1085 and 1094.5 seeking to compel CalPERS to calculate
9 his retirement benefit by dividing his final compensation by the number of months he
10 actually worked during the 2001-2002 academic year, rather than the 12 months prior
to his retirement date. The trial court denied the petition and entered judgment in
favor of CalPERS. Lane timely appealed.

11 Lane v. California Public Employees' Retirement System, No. H031345, 2008 WL 2352480, at *1-
12 3 (2008). The California appellate court then went on to affirm the trial court, concluding that
13 "CalPERS has properly calculated Lane's retirement benefit in accordance with Government Code
14 section 20035, subdivision(a)" Id. at *1. The California Supreme Court summarily denied
15 Lane's petition for further review.

16 According to the complaint in this action, Lane next "wrote to CalPERS asking for an
17 adjustment to his final compensation on the basis of Government Code § 31461.3(a)," which he
18 argues requires CalPERS to calculate his retirement benefit based on the seven and a half months he
19 actually worked during the 12 months preceding his retirement. Complaint at 4. He also sent a
20 petition to the CalPERS Board of Administration seeking the same thing. Id. at 5. CalPERS's legal
21 office responded that Government Code § 31641 was not applicable to Lane's situation. Id. Then, in
22 the summer of 2009, Lane filed another Petition for Writ of Mandate in state court. Id.; see Lane v.
23 California Public Employees' Retirement System, No. 109CV144172 (2009). CalPERS demurred to
24 Lane's Petition, and the Superior Court sustained it without leave to amend. Id.

25 Now Lane has filed in federal court. He claims that under California Government Code §
26 31461.3(a) CalPERS is "required to use actual time worked when calculating retirement benefits
27 for, among others, both CalPERS and [California State Teachers' Retirement System] members,
28

1 who work less than a full calendar year.”² Complaint ¶ 3. Despite this provision, “Defendants have
 2 refused requests by [Lane] to calculate his final compensation on the basis of the 7.5 months he
 3 actually worked in the 12 months preceding his retirement from [SJSU].” *Id.* This refusal, Lane
 4 alleges, ignores Cal. Govt. Code § 31461.3(a) and violates his right to due process under the Fifth
 5 and Fourteen Amendments to the United States Constitution. *Id.* ¶¶ 3, 11, 13.

6 DISCUSSION

7 A. Res Judicata

8 As an initial matter, Defendants argue that Lane’s § 1983 claims are barred by the doctrine
 9 of res judicata. MTD at 7-10.

10 “The doctrine of res judicata bars a party from bringing a claim if a court of competent
 11 jurisdiction has rendered final judgment on the merits of the claim in a previous action involving the
 12 same parties or their privies.” *In re Int’l Nutronics, Inc.*, 28 F.3d 965, 970 (9th Cir. 1994) (citing *In*
 13 *re Jenson*, 980 F.2d 1254, 1256 (9th Cir. 1992). “Res judicata bars all grounds for recovery that
 14 *could have been asserted*, whether they were or not, in a prior suit between the same parties on the
 15 same cause of action.” *Id.* (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir.
 16 1992)) (emphasis in original). Thus, it “precludes piecemeal litigation by splitting a single cause of
 17 action or relitigation of the same cause of action on a different legal theory or for different relief.”
 18 *Mycogen Corp. v. Monsanto Co.*, 28 Cal.4th 888, 897 (2002) (quoting *Weikel v. TCW Realty Fund*
 19 *II Holding Co.*, 55 Cal.App.4th 1234, 1245 (1997)).

20 Its purpose is “to secure the peace and repose of society by the settlement of matters capable
 21 of judicial determination.” *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 49 (1897).

22 Accordingly, “[the] doctrine of res judicata is not a mere matter of practice or procedure inherited
 23 from a more technical time than ours. It is a rule of fundamental and substantial justice, ‘of public
 24 policy and of private peace,’ which should be cordially regarded and enforced by the courts to the

25 ² Cal. Gov’t Code § 31461.3(a) provides in relevant part: “The average compensation during any
 26 period of service as a member of the Public Employees’ Retirement System . . . shall be considered
 27 compensation earnable by a member for purposes of computing final compensation for that member
 28 provided: (1) The period intervening between active memberships in the respective systems does not
 exceed 90 days, or six months if Section 31840.4 applies[; and] (2) He or she retires concurrently
 under both systems and is credited with that period of service under the other system at the time of
 retirement.”

end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect.” Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299 (1917) (citing Kessler v. Eldred, 206 U.S. 285 (1907)).

“[A] federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered” under the Constitution’s Full Faith and Credit Clause and under 28 U.S.C. § 1738. Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 81 (1984). Accordingly, a court should apply California law concerning claim preclusion to a California judgment. See id.; Holcombe v. Hosmer, 477 F.3d 1094, 1097 (9th Cir. 2007) (applying Nevada law to determine preclusive effect of a Nevada state court judgment).

Under California law, for res judicata to bar a subsequent action, “three requirements have to be met: (1) the second lawsuit must involve the same ‘cause of action’ as the first one, (2) there must have been a final judgment on the merits in the first lawsuit and (3) the party to be precluded must itself have been a party, or in privity with a party, to that first lawsuit.” San Diego Police Officers’ Ass’n v. San Diego City Emps.’ Ret. Sys., 568 F.3d 725, 734 (9th Cir. 2009) (summarizing California law).

1. Same Cause of Action

To determine whether prior proceedings involve the same claim or cause of action as the current one, “California has consistently applied the ‘primary rights’ theory, under which the invasion of one primary right gives rise to a single cause of action.” Kay v. City of Rancho Palos Verdes, 504 F.3d 803, 809 (9th Cir. 2007). The Ninth Circuit has explained that under this theory,

a cause of action is comprised of a primary right of the plaintiff, a corresponding primary duty of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a primary right gives rise to but a single cause of action . . . As far as its content is concerned, the primary right is simply the plaintiff’s right to be free from the particular injury suffered.

Maldonado v. Harris, 370 F.3d 945, 952 (9th Cir. 2004) (quoting Mycogen, 28 Cal.4th at 904). In other words, “if two actions involve the same injury to the plaintiff and the same wrong by the

defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.” San Diego Police Officers’ Ass’n, 568 F.3d at 734 (quoting Eichman v. Fotomat Corp., 147 Cal.App.3d 1170 (1983)); see also Gamble v. General Foods, Corp., 229 Cal.App.3d 893, 898 (1991) (“[T]wo actions constitute a single cause of action if they both affect the same primary right.”).

In his present complaint, Lane alleges that his § 1983 claims are based on CalPERS’s alleged violations of his right to due process. Complaint ¶ 13 (“Specifically, this action challenges Defendants’ denial of [Lane’s] due process rights secured under the Fifth and Fourteenth Amendments to the United States Constitution . . . and 42 U.S.C.[] § 1983”); see also id. ¶¶ 56, 59. His due process rights, in turn, were violated when CalPERS refused to calculate his pension according to what he believes is the appropriate statutory provision. Complaint ¶ 11 (“CalPERS’[s] refusal to apply [Cal. Gov’t Code § 31461.3(a)] to calculate Lane’s pension is the basis for his claim of a violation of his constitutional right to due process.”), ¶ 21 (“[Lane] claims [that] CalPERS’[s] refusal to apply § 31461.3(a) or even have a hearing is a violation of his constitutional right to due process.”).

His primary right, then, is his right to have his pension calculated according to law. Complaint ¶ 37 (“Due process protects fundamental rights, which for [Lane] is his right to a correctly calculated pension.”). Lane appears to agree. Indeed, in his opposition he insists that his “primary right to receive a lawfully calculated pension” was violated in three ways: by CalPERS (1) “ignor[ing] statutory and case retirement law”; (2) “knowingly and willingly miscalculat[ing] [his] final compensation; and (3) underpay[ing] him monthly.” Opp’n at 12.

However, Lane incorrectly argues that since he has “suffered three violations of his primary right, he has three causes of action.” Id. He cites two cases for his assertion that “courts have long held that if there have been multiple distinct wrongs against one primary right, there are multiple causes of action, not one, but his reliance on those cases is misplaced. In Gamble, the plaintiff brought an action against her former employer for breach of an implied-in-fact contract to terminate her employment only for good cause and for breach of the implied covenant of good faith and fair

1 dealing. Gamble, 229 Cal.App.3d at 897. The appellate court upheld the lower court's ruling that the
2 plaintiff's complaint was barred by res judicata, as she had lost a prior federal suit in which she
3 alleged that her employment was terminated as a result of race discrimination in violation of Title
4 VII of the Civil Rights Act of 1964 ("Title VII") and 42 U.S.C. § 1981. Id. at 896-97. "In both
5 cases," the court explained, "the asserted primary right is the right to employment." Id. at 901.

6 And in Branson, an employee first unsuccessfully sued his employer for business-related
7 torts and sought statutory indemnity from his co-defendant and employer under Corporations Code
8 § 317. Branson v. Sun-Diamond Growers of California, 24 Cal.App.4th 327, 334-35 (1994). Later,
9 the employee filed another action against his employer for equitable and contractual indemnity. Id.
10 at 335. The trial court dismissed the second action based on res judicata, but the appellate court
11 reversed because the employee's limited right to seek indemnity under Corporations Code section
12 317 did not involve the same primary right as a cause of action for equitable or contractual
13 indemnity. Id. at 338, 343-44. In so ruling, though, the appellate court reaffirmed the established
14 rule that the cause of action for purposes of the doctrine of res judicata "is based on the harm
15 suffered, as opposed to the particular legal theory asserted by the litigant," and so "[e]ven where
16 there are multiple legal theories upon which recovery might be predicated, one injury gives rise to
17 only one claim for relief." Id. at 340-41.

18 Indeed, the cases cited and discussed in Branson to illustrate the distinction between one
19 cause of action versus two demonstrate that Lane only has a single cause of action. In Slater v.
20 Blackwood, 15 Cal.3d 791, 795 (1975), a plaintiff who had been injured in an automobile accident
21 lost an action against the driver and owner of the vehicle for damages under a statutory provision.
22 The plaintiff later filed an action based on a negligence theory, but the court found the suit barred by
23 res judicata because "[t]he 'primary right' alleged to have been violated in the instant case is
24 plaintiff's right to be free from injury to her person." Id. (citation omitted). In Bay Cities Paving &
25 Grading, Inc. v. Lawyers' Mutual Ins. Co., 5 Cal.4th 854 (1993), a contractor was owed money for
26 its work on a construction project. Id. at 857. The attorney who had represented the contractor in
27 connection with the project recorded a mechanic's lien but thereafter failed to serve a stop notice on
28 the project's construction lenders and failed to file a complaint to foreclose the mechanic's lien. Id.

1 As a result of the attorney's omissions, the contractor was unable to collect the amount it was owed.
2 Id. The contractor then filed a legal malpractice claim against its former attorney. Id. The attorney's
3 professional liability insurance policy contained a provision limiting coverage to a maximum of
4 \$250,000 "for each claim" and further provided that, "[t]wo or more claims arising out of a single
5 act, error or omission or a series of related acts, errors or omissions shall be treated as a single
6 claim." Id. As such, the defendant insurance company argued that only one claim was being
7 asserted, even though the contractor alleged two instances of legal malpractice. Id. at 858. Both the
8 trial court and the appellate court concluded that the two acts of legal malpractice constituted
9 separate claims, but the California Supreme Court reversed. Id. at 873. "These two acts of legal
10 malpractice, the court ruled, deprived the client of only one primary right. The plaintiff 'had one
11 primary right — the right to be free of negligence by its attorney in connection with the particular
12 debt collection for he was retained. He allegedly breached that right in two ways, but it nevertheless
13 remained a single right.'" Branson at 342 (quoting Bay Cities, 5 Cal.4th at 860).

14 Unlike the plaintiffs in those cases, the plaintiffs in Agarwal v. Johnson, 25 Cal.3d 932
15 (1979) and Craig v. County of Los Angeles, 221 Cal.App.3d 1294 (1990) had two causes of action.
16 In Agarwal, the court distinguished between the plaintiff's rights against discriminatory
17 employment practices under Title VII and his rights not to be defamed or intentionally inflicted with
18 emotional distress. Agarwal, 25 Cal.3d at 955. And in Craig, the court distinguished between the
19 primary right to be employed as a harbor patrol officer and the primary right to seek damages and
20 past salary based on the defendants' wrongful conduct. Craig, 221 Cal.App.3d at 1301-02.

21 Here, as mentioned above, Lane's primary right is his right to have his pension calculated
22 according to law. In his previous action, he argued that CalPERS should have calculated his pension
23 according to Cal. Gov't Code § 20035(a). Now, he argues that CalPERS should have calculated his
24 pension according to Cal. Gov't Code § 31461.3(a). Both claims relate to his single primary right.

25 Despite his assertion in his complaint that Defendants violated his right to a correctly
26 calculated pension, he also contends in his opposition brief that he has "three primary rights: (1) his
27 right to expect CalPERS to know and follow retirement law in full; (2) his right to have his final
28 compensation calculated according to all applicable law; and (3) his right to receive a correctly

1 calculated fractional portion thereof as his monthly pension.” Opp’n at 12-13. According to him,
 2 none of these three “rights” have been adjudicated since the “the only issue ever before a court was
 3 the use of ‘12 months’ to calculate [his] final compensation, which has nothing to do with the
 4 instant case.” Id. at 12.

5 But it has everything to do with this case. Lane’s position here is “premised on a distinction
 6 without a difference.” San Diego Police Officers’ Ass’n, 568 F.3d at 736. In San Diego Police
 7 Officers’ Ass’n, the plaintiff argued that its prior action involved claims that the defendant failed to
 8 fund a retirement system at the fixed rate agreed to in certain agreements, but its subsequent action
 9 involved claims that the underlying funding system created by one of those agreements was itself
 10 unlawful. Id. at 735. The Ninth Circuit found the plaintiff’s distinction to be without merit:

11 Although its claims in this action literally focus on the enactment of [the agreement at
 12 issue] and the funding levels it created, rather than on the question of [the city
 13 defendant’s] compliance with those levels, they are nevertheless unquestionably
 14 “based upon [the city defendant’s] failure to pay the amount annually determined by
 15 the [retirement system’s] actuary and approved by the [retirement system’s board]
 16 from 1996 to 2006.” Whether that failure is framed in terms of not having funded [the
 17 retirement system] at the rate established by the [agreement at issue] or in terms of
 18 the enactment of [that agreement] as such, the alleged violation is the same: the level
 19 at which payments were made to [the retirement system] is claimed to have been
 20 impermissibly lower than that determined by the [the retirement system’s] actuary.

21 Id.

22 Here, Lane unpersuasively tries to divide up his single primary right — his right to have his
 23 pension calculated correctly — into three smaller, “sub-rights.” Nonetheless, the alleged harm to
 24 him is based on CalPERS’s calculation of his pension using 12 months instead of 7.5 months, and
 25 this is exactly the issue that was taken up during the state proceedings. The fact that he now alleges
 26 that CalPERS needs to follow a different statutory provision which would result in its calculating his
 27 pension using 7.5 months does not give him a new primary right, especially when he could have
 28 raised this issue before. Robi v. Five Platters, Inc., 838 F.2d 318, 324 (9th Cir. 1988) (“California’s
 ‘primary rights’ theory does not mean that different causes of action are involved just because relief
 may be obtained under . . . either of two legal theories.”) (internal quotation marks omitted).

1 In sum, Lane has a single primary right, and it was adjudicated at the state level. Thus, for
2 res judicata purposes, the Court finds that the instant action involves the “same cause of action” as
3 that addressed in the prior state proceedings.

4 2. Final Judgment on the Merits

5 As explained above, Lane has had an administrative hearing and state trial court proceedings
6 about whether CalPERS properly calculated his pension. The appellate court ruled on the issue, and
7 the California Supreme Court denied Lane’s petition for hearing. There has been a final judgment on
8 the merits of this issue.

9 3. Parties in Privity

10 In the state court proceedings, Lane proceeded against CalPERS. Here, Defendants are the
11 CEO of CalPERS and the President of the CalPERS Board of Administration. However, since their
12 liability would be derivative of CalPERS’s liability, they are in privity with CalPERS, and they need
13 not have been a party to the state court proceedings. See Brinton v. Bankers Pension Services, Inc.,
14 76 Cal.App.4th 550, 557-58 (1999) (citing Sartor v. Superior Court, 136 Cal.App.3d 322, 326-328
15 (1982) (confirmed arbitration award finding corporation liable only for defective solar panel gaskets
16 barred subsequent action against corporation’s employees alleging fraud and negligence for other
17 alleged construction defects); City of Los Angeles v. Superior Court, 85 Cal.App.3d 143, 154-155
18 (1978) (prior judgment in favor of county and city employees in federal civil rights action barred
19 action against both employees and the county and city seeking damages for conversion); Loughran
20 v. Reynolds, 70 Cal.App.2d 241, 244-245 (1945) (prior judgment in bankruptcy limiting plaintiff’s
21 recovery against corporation barred subsequent action against individual alleged to be corporation’s
22 alter ego); Bernhard v. Bank of America, 19 Cal.2d 807, 812-813 (1942) (recognizing the rule in
23 dictum)).

24 * * *

25 Based on the above, this Court holds that Lane’s § 1983 claims against Defendants are
26 barred by res judicata.³ Accordingly, his claims are dismissed with prejudice.

27 _____
28 ³ Because the Court holds that Lane’s claims are barred by res judicata, it need not address
Defendants’ other arguments in support of dismissing his § 1983 claims. The other arguments,
however, appear to be meritorious.

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1 **C10-05779 HRL Notice will be electronically mailed to:**

2 D. Gregory Valenza gvalenza@shawvalenza.com, cangel@shawvalenza.com

3 **Notice will be provided by other means to:**

4 Richard R. Lane
5 1266 Sandia Avenue
6 Sunnyvale, CA 94089

7 **Counsel are responsible for distributing copies of this document to co-counsel who have not
8 registered for e-filing under the court's CM/ECF program.**

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